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No. 1385

IN THE

# Supreme Court of the United States

October Term 1968

J. C. LONG and ALBERTA S. LONG, PETITIONERS

versus

BRUNSWICK CORPORATION, a corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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**Section 41-205**

**Section 57-308**

**Section 60-101**

No._____

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BRUNSWICK CORPORATION, a corporation

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. C. Long and Alberta S. Long, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINION BELOW

The opinion of the United States District Court for the District of South Carolina entered and filed by the Court on December 7, 1966 and a further Order entered and filed February 27, 1967 and not officially reported. (Appendix A, infra pp. 1a, 13a). The opinion of the United States Court of Appeals for the Fourth Circuit was filed February 2, 1968 and is not officially reported. (Appendix A, infra p. 21a).

## JURISDICTION.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 2, 1968. An Order refusing to extend the time for rehearing was filed March 27, 1968. (Appendix A, p. 32a). The jurisdiction of the Court is invoked under 28 U. S. Code 1254(1).

## QUESTIONS PRESENTED

### I.

Whether *Erie R. Co. vs. Tompkins*, 304 U.S. 64, requires the United States Courts in a diversity case tried under the Laws of South Carolina to uphold the priority of a landlord, under a written and recorded lease, with respect to chattels placed on his premises, a lien on which is subsequently asserted under a tardily recorded chattel mortgage?

### II.

Whether *Erie R. Co. vs. Tompkins*, 304 U.S. 64, requires the United States Courts in a diversity case, wherein the owner of a chattel mortgage initiates the suit under a procedure peculiar to the statutory law of South Carolina, to limit the owner of the chattel mortgage to the relief provided by the statutory procedure.

### III.

Whether *Erie R. Co. vs. Tompkins*, 304 U.S. 64, requires the United States Courts to award Landlord judgment on the counterclaim for damages actual and punitive against the owner of a chattel mortgage which trespassed on Landlord's priority by seizing chattels on the premises when the owner of the chattel mortgage knew that the landlord had priority?

## STATUTES INVOLVED

The following statutory provisions are set out in Appendix B, infra: Sections 10-2501, 10-2504, 10-2516, 41-4, 41-165, 41-205, 57-308, and 60-101, Code of Laws of South Carolina for 1962.

## STATEMENT

Jurisdiction of this suit was founded on diversity and amount in controversy. This is a statutory proceeding known as "Claim and Delivery" under South Carolina statutes Sections 10-2501 through 10-2516, Code of Laws of South Carolina for 1962.

Brunswick Corporation commenced this suit against Floyd Corporation to repossess certain bowling lanes and equipment which were on the premises which Floyd occupied under lease from Petitioners J. C. Long and Alberta S. Long, landlords. The landlords were not made a party to the suit but intervened as soon as they became aware of it. Floyd Corporation defaulted and is no longer party to these proceedings.

Floyd Corporation had on February 22, 1962, with the knowledge of Brunswick and in the mutual interests of itself and Brunswick (TR 83, 84, 89, 90 and 94) entered into a ten (10) year lease at a guaranteed rental of One Hundred Twenty-eight Thousand Five Hundred Fifty-seven and 20/100 ($128,557.20) Dollars with The Beach Co. whereby The Beach Co. was to construct on its premises a building to contain the very lanes and pinsetters which are the principal object of this controversy. (TR 84 and 85).

These lanes and pinsetters were at that time in Floyd's possession in the Charleston area (TR 87) and Floyd contracted with Brunswick for Brunswick to perform the installation of this equipment in the new building (TR 66). The plans and specifications for this building (Intervenors' Exhibits A

& B) which were prepared by Floyd's architect (TR 84) provided that Floyd would install this equipment not the landlord, The Beach Co. Floyd never told Beach Co. that Brunswick had a lien on this property (TR. 21 and 22).

This building is virtually a single purpose building (TR 156) and cost over Ninety Thousand ($90,000.00) Dollars to build (TR 177).

J. C. Long and Alberta S. Long purchased the premises from The Beach Co. and are the landlords in this case.

The lease was recorded in short form on March 3, 1962 in the proper public office in Charleston County, South Carolina, and the short form was conceded by counsel for Brunswick to be evidence of the long form (TR 22 & 23).

The significant portions of the lease are the following:

> "TERM: Ten (10) years with Tenant's option for five (5) years.
>
> RENTAL PAYABLE MONTHLY: Ten (10) percent gross receipts with guaranteed minimum.
>
> ••••••
>
> "4. RENTAL.
>
> A. Floyd agrees to pay The Beach Co. for the original ten year term of this lease, a guaranteed minimum rental of $128,557.20 payable in advance in one hundred twenty (120) equal monthly installments of $1,071.31 on or before the 10th day of each month and every month during the ten year term hereof and the additional five year term if exercised by the tenant and at the same rate • • •
>
> "10. FLOYD'S PROPERTY.
>
> A. All equipment and trade fixtures placed in or on the said premises by Floyd shall remain the property of Floyd, which shall have the right to remove the same

within ten (10) days after the termination of this lease provided Floyd be not in default hereunder, and provided further, that Floyd shall repair, or reimburse Beach Co. for the cost of repairing any damage resulting to the demised premises from the removal of such trade equipment or trade fixtures." (Plaintiff's Exhibit 1)

The landlord intervened and contested Brunswick's seizure of the chattels on the ground that the landlord had a prior right under his written and recorded lease to have the chattels act as security for the performance of the lease, that he had complied with Sections 41-4 and 60-101 Code of Laws of South Carolina for 1962 which thereby gave the landlord's lease priority and that the tenant was barred under Section 57-308 from asserting any claim insofar as it affects the landlord in that parol and unrecorded reservations in personal property are void with respect to purchasers for a valuable consideration without notice. The landlord relied on the case of *Leggett & Co. vs. Orangeburg Piggly Wiggly Co.*, 176 S.C. 449, 180 S.E. 483 (1935) which gave priority to the landlord for the full term of his lease over the holder of a chattel mortgage where the landlord has made a timely recording of the lease and the chattel mortgagee has failed to record.

Landlord further asserts that Brunswick's conduct was a trespass on the rights of the landlord and that the manner in which it was performed was such as to entitle the landlord to actual and punitive damages in that without notice to the landlord Brunswick had seized the chattels on which Brunswick knew the landlord had a prior claim.

Brunswick asserted Section 41-205 Code of Laws of South Carolina for 1962, referred to as the Statute of Anne, as justification for its right to the chattels stating that this section limits the landlord's rights to the payment of only so much

rent that was due for the current month at the time of the taking and past due rent.

The bowling alleys known as "Pleasant Lanes" opened an September 15, 1962. More than one (1) month later, over six (6) months after the lease had been recorded October 24, 1962, Floyd Corporation executed a conditional sales contract with Brunswick Corporation on the lanes and pinsetters. This contract was not recorded until almost three (3) months afterwards on January 21, 1963. Just about eleven (11) months had passed since the recording of the lease.

Certain other miscellaneous equipment was also sold by Brunswick to Floyd by a conditional sales contract dated August 17, 1962 and recorded August 20, 1962. Brunswick offered no evidence that the execution and recording of this contract occurred before the chattels were placed on the premises.

More than a year after the lease had been recorded Brunswick had requested the landlord to subordinate the lease to the chattel mortgages. Landlord had refused. (TR 97, 98 and 175).

When Brunswick Corporation brought claim and delivery to repossess the lanes, pinsetters and miscellaneous equipment there was a balance of rent due of One Hundred Thousand Four Hundred Twenty-seven and 57/100 ($100,427.57) Dollars remaining on the balance of the ten (10) year lease. Brunswick did not join the landlord in the suit or contact the landlord in any manner.

The United States District Court has recognized the priority of the landlord's recorded lease but predicated this priority on the Statute of Anne, Section 41-205 Code of Laws of South Carolina for 1962. The Court in effect overruled *Leggett*

*& Co. vs. Orangeburg Piggly-Wiggly Co.*, 176 S.C. 449, 180 S.E. 482 (1935) and placed landlord in no better position than he would have occupied had he not even had a written lease much less a written and recorded lease. The Court also held that Brunswick had a right to repossess despite landlord's priority upon paying landlord One Thousand Four Hundred Eighty-six and 41/100 ($1,486.41) Dollars, less two months' rent, and that landlord had no cross action because Brunswick was doing what it could lawfully do.

At the hearing before the United States District Court on January 5, 1967 landlords contended that Brunswick having entered up a money judgment for its claim against Floyd Corporation it thereby waived its claim to possession of the chattels but the Court overruled this contention. (Hearing of Motion Jan. 2, 1967, P. 2)

On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the landlords urged the Court of Appeals to recognize their priority under the recording statutes, to enforce the lease according to its terms, to hold that Brunswick had waived its claim to possession by entering a money judgment against Floyd Corporation, and to award landlords judgment on the counterclaim.

The Circuit Court in affirming the District Court, did not follow the *Piggly-Wiggly* case and the recording statutes of the State of South Carolina. It has not followed the decisions of the South Carolina Courts interpreting the statutory remedy of Claim and Delivery Sections 10-2501, 10-2503, 10-2504, and 10-2516, Code of Laws of South Carolina for 1962, the latest of which *Washington v. Western Auto Supply Co.*, 230 S.C. 424, 96 S.E. 2d 63 (1957) held that entry of a money judgment for the value of the property waived any right to the possession thereof.

The Courts have granted landlords a limited priority under the Statute of Anne. Landlords assert they are entitled to greater protection under the recording statutes and that when Brunswick, without notice to landlords, attempted by Court action to take possession of chattels to which landlords had priority, Brunswick thereby committed a trespass upon the rights of landlords and became liable in damages actual and punitive to landlords.

The Circuit Court of Appeals for the Fourth Circuit dismissed the counterclaim.

From these rulings which are in derogation of *Erie R. Co. v. Thompkins,* 307 U.S. 64, the petitioners seek relief by Writ of Certiorari.

## REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals for the Fourth Circuit violates the principles of *Erie R. Co. vs. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L Ed 1188.

The decision of the United States Circuit Court of Appeals for the Fourth Circuit is squarely in conflict with the decision of the Supreme Court of South Carolina in *Leggett & Co. vs. Orangeburg Piggly-Wiggly,* 176 S.C. 449, 180 S.E. 483 (1935); ignores Sections 41-4, 57-308 and 60-101 Code of Laws of South Carolina 1962 the pertinent recording statutes; misconstrues the plain language of the lease; and permits Brunswick to seize property prior to a determination of the suit under a South Carolina procedure "Claim and Delivery", Section 10-2501, et sequitur Code of Laws of South Carolina for 1962, secure a money judgment against Floyd Corporation, contrary to the South Carolina law and retain the chattels when South Carolina decisions plainly provide that the entry of a money judgment in "Claim and Delivery" waives the right to possession of the chattels.

## I.

### Piggly-Wiggly

The relevant facts of the *Piggly-Wiggly* case are these. Landlord leased a store to tenant for a five (5) year term at a stated rental for the term to be paid monthly. On the same day the lease was executed tenant bought some fixtures. The lease was recorded on December 31, 1929. The fixtures were moved onto the premises in February 1930 but the chattel mortgage on the fixtures was not recorded until March 18, 1930. On December 24, 1932 tenant went into receivership. At that time tenant owed Five Hundred Twenty ($520.00) Dollars for 1932 and at least two more years rent. One thousand seventy-four and 60/100 ($1,074.60) Dollars was owed on the chattel mortgage.

The Statement of Facts by the Court:

> "Mrs. Freeland • • • • leased her storeroom • • • • for a period of five years at a stated rental to be paid monthly." @ 484.

The case was heard by a special referee who ruled in favor of the chattel mortgagee that the chattel mortgage had priority after the date it was recorded, March 18, 1930, over all rents thereafter accruing.

The circuit judge overruled the referee and held that since the lease was for a five (5) year term under a written contract, all of the rent was due on the date the lease was executed and since the lease was recorded before the fixtures were brought onto the premises, the lien of the landlord for rent had priority.

The South Carolina Supreme Court affirmed the Circuit Judge. Justice Bonham, who wrote the opinion, said:

> "The views of the writer of this opinion have always been in accord with those expressed by the special referee herein, but as was said by Mr. Chief Justice Blease, in which this writer concurred, it is essential that this vexed question be definitely settled. Since, therefore, the majority of the court held in acordance with the views of the circuit judge, the appeal must be dismissed and the judgment affirmed." @ p. 485.

On petition for Rehearing, the appellant asserted that under the written lease Piggly-Wiggly, the tenant had a legal right to remove the fixtures.

The Court said:

> "The lease gives the lessee the right to remove the fixtures, but it will not be contended that he could exercise that right while owing rent, still unpaid. @ 485.

In the case at bar we have a written lease at a stated sum a ten year term payable monthly. It is in evidence, it is uncontradicted, it speaks for itself. (Plaintiff's Exhibit 1)

This lease in Paragraph 10 (Statement page 3), gives the tenant the right to remove his property at the end of the term provided he has paid all rent and he restores the premises in the event of damage due to removal.

The essentials of the Floyd lease and the *Piggly-Wiggly* lease are virtually the same. The law should be the same.

It is important to note that the Piggly-Wiggly decision came at the end of a series of decisions involving contests between the landlord and the chattel mortgagee. The cases start with *Simpson vs. McDonald*, 72 S.C. 277, 60 S.E. 675 (1908) and end with *Piggly-Wiggly*. *Simpson vs. McDonald* was the law until 1930 when it was overruled by *Fidelity Trust & Mortgage*

*Co. vs. Davis*, 158 S.C. 400, 155 S.E. 622 (1930). The last was a bad decision and the very next time the question came before the South Carolina Supreme Court it reversed itself. *United States Hoffman Machinery Corporation vs. Harris*, 167 S.C. 443, 166 S.E. 613 (1932). The *Harris* case was followed by *Mather-James Co., Inc. vs. Wilson*, 127 S.C. 387, 174 S.E. 265 (1934) and in 1935 by *Piggly-Wiggly*.

*Piggly-Wiggly appears* to have put the law at rest to have definitely settled this vexing question because there have been no reported cases on this question of priority since 1935.

The Supreme Court of South Carolina based its decision on these words:

> "And just here may be mentioned a condition which has a material bearing on the question. If the rental contract be for a certain amount, say $600 for a year, then the entire amount must be considered as due at the beginning of the contract, although the payments may be made on a monthly basis of $50 per month. While, on the other hand, if the rental contract be by the month, the recorded mortgage ranks ahead of the monthly rent which is not due." @ 485.

It is significant that Landlords in the instant case based their rights on the recording statutes.

Aside from the recording statutes, and without a written lease, landlord would be entitled to the rights which the Circuit Court of Appeals has recognized under the Statute of Anne. These landlords are not asserting any rights to distraint. They assert their right to priority under their written and properly recorded lease. They ask for specific performance of the lease in its terms. Under that lease as under any contract, landlord has many rights, one of which is to distrain, if landlord

desires, as each monthly installment of rent comes due, or he may wait until many months have accumulated. This right exists even without a written lease, on a month to month contract. *Frady vs. Smith*, 247 S.C. 353, 147 S.E.2d 412 (1966).

*Gentry vs. Recreation, Inc.*, 192 S.C. 429, 7 S.E.2d 63 (1940) has been cited as overruling *Piggly-Wiggly sub silentio*. We submit that *Gentry* is authority solely in those cases where the lease was not recorded and was not entitled to priority under the recording statutes. In the *Gentry* case the landlord had not recorded the lease, the chattel mortgage had been duly recorded and landlord tried to distrain on the chattels. Distraint was the only remedy available to the landlord.

The court speaks of rent for the unexpired term as "unearned or future rent" and absolved the chattel mortgagee of liability therefrom because he had no notice from the recording of the lease and was a bona fide purchaser for value.

We submit that the result of the *Gentry* case was absolutely correct but it did not revive the *Fidelity Trust* case, supra, except with reference to the remedy of distraint, which is not in issue in our case.

The court said:

> "Certainly, such a limitation upon the rather extraordinary remedy of distress cannot be deemed unjust or unreasonable." @ 67.

J. C. Long and Alberta S. Long are not seeking to distrain. They ask the court to enforce Paragraph 10 of the lease to require Brunswick to leave the chattels on the premises.

Our landlords have complied with Section 41-4 Code of Laws of South Carolina for 1962 which requires a lease to be recorded in order for it to be notice to third parties. They

have also complied with Section 60-101 which renders invalid as to third parties without notice all leases for periods in excess of twelve months unless recorded and then only from the time of recording.

Further, under Section 57-308 an unrecorded reservation in personal property is void as to subsequent creditors whether lien creditors or contract creditors. Brunswick did not record its chattel mortgage before placing the chattels on the premises and as to the landlord the chattel mortgage is void. A landlord is a subsequent creditor within the meaning of this statute. *U. S. Hoffman Machinery Co. vs. Harris*, supra.

The construction which the Courts below have placed on this lease has the effect of rendered it worthless. Landlord would be just as well protected under a month to month tenancy.

We submit that under the recording statutes and *Piggly-Wiggly* the landlords, J. C. Long and Alberta S. Long are entitled to have the lanes and pinsetters remain in the premises.

## II.

## CLAIM AND DELIVERY

This is a statutory procedure for regaining possession of personal property. Without following this procedure Brunswick would have had no way to attach the chattels at the inception of the suit. Brunswick would have had to wait until the suit was terminated successfully in its favor in order to secure possession of the chattels by court order.

We have contended that Brunswick had no right to employ this remedy so long as landlord was entitled to priority, and, further, even if Brunswick were entitled to possession of the

chattels Brunswick waived the right, under South Carolina law, by taking a money judgment against Floyd.

Section 10-2516 Code of Laws of South Carolina for 1962 provides the specific relief and the only relief available under Claim and Delivery, namely: Judgment must be rendered in the alternative for possession or if possession cannot be had for the value of the chattels together with damages, actual and punitive, for the detention of the chattels.

Brunswick entered a money judgment against Floyd Corporation on October 20, 1966. At a hearing on January 5, 1967, landlord requested the Court to rule that thereby Brunswick had vaived any right to possession of the chattels which it may have had. The Court did not follow this contention and on appeal the Circuit Court held that both forms of relief were available to Brunswick.

We submit that this is contrary to the rulings of the Supreme Court of South Carolina.

In *Robbins vs. Slattery*, 30 S.C. 328, 9 S.E. 510 (1889) a judgment in a claim and delivery action which provided for a money judgment only was held erroneous. However, previously, in *Richey & Milen vs. Dupre*, 20 S.C. 6 (1883), where the chattel was not available for return, the award of a money judgment was approved.

In *Duc vs. Seel*, 134 S.C. 10, 131 S.E. 778 (1926) the Court held that where Plaintiff had been successful in the suit in Claim and Delivery but the jury had rendered a money judgment without providing for return of the chattel in the alternative, and Plaintiff had tried to collect the money judgment, Plaintiff thereby waived his right to return of the chattel.

In the more recent case *Washington vs. Western Auto Supply Co.*, 230 S.C. 424, 96 S.E. 2d 63 (1957) Washington had pur-

chased some furniture from Western. Western posted a bond and brought Claim and Delivery for the furniture, claiming a default in a chattel mortgage. Washington answered the suit and the jury awarded her judgment for possession of the furniture or Four Hundred ($400.00) Dollars. Washington entered up the judgment Western appealed and lost the appeal.

Subsequently Washington brought a suit against Western for the wrongful taking and withholding of her property. Western demurred on the ground of res adjudicata.

Our Court held that when Washington entered up the money judgment in the previous suit she thereby waived any right to possession of the furniture. The demurrer was sustained.

When the holder of a chattel mortgage takes a money judgment he waives his claim on the property. He elects to look to the debtor and not to the property for recovery.

Under South Carolina procedure the holder of a chattel mortgage may bring Claim and Delivery on default, take possession of the chattels before trial by posting bond, and if successful secure possession of the chattels then sell the chattels and if not sufficient to satisfy the debt, bring suit for any balance.

Or, the holder of a chattel mortgage may bring a foreclosure suit in equity but in such a suit the holder could not attach the chattels until after the Court tried the case and decreed foreclosure whereupon the Court would sell the chattels and apply the proceeds as it determined by its decree.

The instant case appears novel under South Carolina practice in that Brunswick appears to be following both procedures at once. Nevertheless having secured a money judgment which has been duly entered, Brunswick has waived any

further claim on the chattels and landlord is entitled to retain possession thereof.

## III.

## THE COUNTERCLAIM

The United States Court for the District of South Carolina and the Circuit Court of Appeals for the Fourth Circuit have recognized that landlords have priority, yet the courts have refused to vindicate landlords' rights by giving judgment on the counterclaim.

The Statue of Anne, Section 41-205 Code of Laws of South Carolina 1962, which Brunswick has raised as a defense, requires that no chattels be taken by any pretense unless the moving party shall before removal of the goods, pay the landlord all sums due for rent, up to one year's rent in arrears.

Brunswick never offered to pay one cent of rent prior to seizing the chattels and did not join the landlord in the suit. This in itself is a trespass upon landlord' rights and for this alone landlord is entitled to actual and punitive damages. *Graham vs. Seignous*, 53 S.C. 132, 31 S.E. 51 (1898), *Bigham vs. Harvy*, 91 S.C. 121, 74 S.E. 369 (1912).

Punitive damages are a matter of right under South Carolina law. *Sample vs. Gulf Refining Co.*, 183 S.C. 421, 191 S.E. 215 (1937); *Kurshner vs. Leggette*, 330 F.2d 447 (1964) 4th Circuit.

## IV.

The questions presented are of great importance to every landlord in the State of South Carolina in that a settled rule established finally in *Leggett & Co. v. Piggly-Wiggly*, supra, has been upset and the old conflict will be resumed. There

is no way to estimate the number of leases that are effected but it is certain that the number is very large because in the normal day to day business operations tenants are continually purchasing chattels on time and bringing them upon the landlord's premises. There is no way to know how many long term leases, extending over many years, now in operation are affected by this decision but it seems reasonable to believe that the number is considerable. Under the principle of *Erie R. Co. v. Thompkins*, supra, this court should affirm the holdings of *Leggett & Co. v. Piggly-Wiggly*, supra, and re-establish the law in this area.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed, with direction to dismiss the complaint and to enter judgment granting appropriate relief to petitioner on the counterclaim.

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APPENDIX A

No._____

IN THE

# Supreme Court of the United States

October Term 1968

---

J. C. LONG and ALBERTA S. LONG, PETITIONERS

versus

BRUNSWICK CORPORATION, a corporation

---

## ORDER OF JUDGE HEMPHILL

December 7, 1966

This action was brought by the Brunswick Corporation as the conditional vendor of certain bowling equipment against the Floyd Corporation the conditional vendee, for claim and delivery[1] of the chattels and for judgment for the unpaid purchase money. This equipment was located in a building leased by the Floyd Corporation from the Beach Company. After the action was initiated on February 3, 1965 the Floyd Corporation[2] defaulted, and at the demand of the plaintiff

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[1]Claim and Delivery actions in South Carolina are governed by statute at S. C. Code Ann. § 10-2501, 10-2516 (1962).

[2]Raymond Floyd was a major shareholder in the Floyd Corporation during the transactions out of which this action arises. He appeared as a witness at the trial but at the time of the trial he had divested himself of his interest in the corporation.

the United States Marshal seized the property. Upon learning of this Mr. J. C. Long and Mrs. Alberta Long, who were assignees of the lease from the Beach Company,[3] intervened in the action asserting a priority interest in the equipment for past due rents. They also counterclaimed against the plaintiff for damages for trespass and conversion of the equipment. The action was tried without a jury.

The plaintiff asserted three causes of action: the first was based on a chattel mortgage covering miscellaneous goods:[4] the second was based on a chattel mortgage covering pinsetters and lanes;[5] the third was based on an open account.[6]

## FINDING OF FACT

Some time ago Raymond Floyd and a partner bought certain bowling equipment from the Brunswick Corporation. The equipment was the lanes and pinsetters which are involved in the second cause of action in this suit. At that time the equipment was located in Berkeley County and the chattel mortgage was recorded there. Later the partnership was dissolved. The partners agreed among other things that Floyd would assume certain debts of the other partner and that he

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[3]Mr. Long holds shares in the Beach Company and was involved in the negotiations leading to the construction of the building and the lease to Floyd Corporation.

[4]The chattel mortgage which is the basis of the first cause of action covers miscellaneous equipment such as Tel-E-Score Ensembles, chairs, pin sets, balls, shoes and other miscellaneous equipment covered by the conditional sales contract dated August 17, 1962 and which was recorded August 20, 1962 and which secures an amount of $14,865.31.

[5]The second cause of action is based on a chattel mortgage covering pinsetters and lanes which secures an amount of $71,652.35. This mortgage is dated 24 October 1962 and is recorded as of January 21, 1963.

[6]The third cause of action is based on an unsecured obligation of $3,243.12. The intervenor did not contest the third cause of action.

would take the partner's equity in the bowling equipment. Floyd obtained approval from the Brunswick Corporation to do this and to change to a more favorable location for operations in Charleston County. To accomplish this transfer to Floyd the Brunswick Corporation foreclosed on the existing chattel mortgage and took title. Floyd purchased the equipment for the unpaid purchase price on the original sale. The original recorded chattel mortage in Berkeley County is not material to this controversy. The equipment never left South Carolina throughout the transaction, and because it was not shipped from the manufacturer on the sale to Floyd a certain routine shipping procedure of Brunswick's was not accomplished. It appears that whenever this type equipment is to be shipped under a conditional sales contract the Brunswick Corporation ordinarily requires that the landlord of the vendee subordinate his lease interest to the chattel mortgage interest by waiver. This was not done at the time and the fact of its omission bears on the controversy at hand.

Floyd then began negotiating for a new building with the Beach Company through Mr. J. C. Long. This resulted in an agreement that the Beach Company would construct the buildings and lease it to Raymond Floyd's Company, the Floyd Corporation, which would furnish the air conditioning and heating systems for the building, the lanes foundation, and place the bowling equipment in the building. The intervenors conceded at the trial that no issue was raised regarding the doctrine of trade fixtures. The testimony is disputed as to what representations were made by Floyd to Mr. Long regarding the existence of any liens on the lanes and pinsetters. Mr. Long testified that because this was to be an expensive, special purpose building that Floyd's ownership of the equipment was necessary as an incentive for him to go ahead with the building and lease. Mr. Floyd's testimony is that he never

actually represented that he had title free and clear of any encumbrances. However, the landlord made a thorough search of the records and found nothing on record.

A ten year lease was signed on February 22, 1962 and recorded in short form March 14, 1962 and construction began. The building was delivered and rents became payable on or by September 5, 1962. Approximately a month before the opening on or around September 15, 1962 the bowling equipment was delivered on the premises. At that time the equipment was subject to a contract to sell which sale had not been executed and recorded. On October 24, 1962 the contract was signed, and on January 21, 1963 the mortgage was recorded. The contract for the miscellaneous equipment in the first cause of action was signed August 17, 1962 and recorded August 20, 1962. There was no evidence as to when the miscellaneous equipment was delivered but it was delivered prior to the recordation of the lien instrument. There was no evidence that the landlord had actual notice of the conditional sales lien of Brunswick, and it is undisputed that at the time the chattels were brought on the premises there was no record notice of any claim by Brunswick. Therefore it is unnecessary to resolve any conflict in the evidence as to what Floyd represented to Mr. Long in the pre-lease negotiations.

The foregoing depicts generally the situation of the parties at the commencement of business operations. During the first few months of operation it became apparent that revenues were to be less than expected. Some payments were made on the contract for miscellaneous equipment but after October 30, 1963 no further payments were made on that account. No payments were made on the larger contract for lanes and pinsetters from the beginning of October 1962 until February of 1964 after which time three or four small payments were

made. After March 13, 1964 no further payments were made on that contract. Arrangements had been made with the Brunswick Corporation for extensions and revisions of the payment plans so that at the time of trial the initial balances called for by the contract had been increased and the contract amounts were indisputably due and payable.

The rental payments under the lease were also in arrears so that by January 22, 1965 Floyd Corporaton was in default $2,086.41. On that date the landlord distrained on certain chattels other than those subject to he Brunswick mortgages and this action. On February 2, 1965 a rental payment of $600.00 was made which reduced the balance due accordingly. However, it was in July of 1963 that the Brunswick Corporation through Floyd belatedly requested of the landlord that he subordinate the lease interest to the chattel mortgages. This was refused by the landlord because, as he asserted, a clear title to the equipment by Floyd was a premise in which he depended when he undertook to put up this special building. He then searched the records again and found the two chattel mortagages which had been recorded in the meantime.

On February 3, 1965 Brunswick filed this action and had the United States Marshal seize the equipment under the claim and delivery procedures. The landlord became aware of this action by chance without any formal notice and he was allowed to intervene in the action. The lanes were closed for a period of three or four weeks: the landlord then had a receiver appointed on February 25, 1965 and provided funds for operating capital. At the time the Marshal seized the property the tenant was behind for about one month to six weeks rents. The tenant Floyd Corporation did not answer and is in default. The plaintiff proved contract debts for the unpaid purchase money in the amount of $13,620.75 in the

first cause of action; $84,174.55 in the second cause of action; and $3,243.12 in the third cause of action. Judgment was ordered on these issues at the trial, and if judgment has not yet been entered, it is now ordered.

The controversy between the landlord as intervenor and the Brunswick Corporation is for priority in the equipment sold by Brunswick. The intervenor answered by denial, and estoppel on the first cause of action; denial and estoppel (apparently) on the second cause of action, with allegations raising the issue as to whether this equipment had become fixtures; did not contest the third cause of action; and counterclaimed for a wilful trespass and conversion.

Relative to the counterclaim damages evidence was submitted that prior to the seizure of the lanes the landlord was slowly but certainly collecting his rents under the lease; that the rents had not been paid since the seizure for the eighteen months prior to trial; that much of the business has been lost because of the irregular operation of the lanes; that the equipment itself has been damaged through lack of proper maintenance during the periods of inoperation; and that the building could not be readily converted to any other use, and at best the concrete floor would be damaged by removal of the lane foundation material.

The portions of the lease which are pertinent can be summarized as follows:

1. Floyd agrees to pay Beach Company for the original ten-year term of the lease a guaranteed minimum rental of one hundred and twenty-eight thousand five hundred fifty-seven and 20/100 ($128,557.20) dollars, payable in advance in one hundred and twenty (120) equal monthly installments of one thousand seventy-one and 21/100 ($1,071.21) dollars

on or before the tenth day of each month and every month during the ten-year term of the lease. By a supplement dated 11 September 1962, it was recited that The Beach Company had, at the request of Floyd, performed certain extra work in the construction of the building, whereby the monthly rental was to be increased in the amount of fourteen and 16/100 ($14.16) dollars to provide for a regular monthly payment of one thousand eighty-five and 47/100 ($1,085.47) dollars.

2. It is provided that the rental shall commence as of the date of delivery of the demised premises (subsequently established as 5 September 1962.)

3. The lease provides that upon the delivery and possession to the Tenant the Tenant shall "install and thereafter operate and maintain throughout the terms of this lease, a modern Bowling Center establishment wherein the sale, rental and use of bowling alleys and equipment *** shall be the primary business of Floyd."

4. The lease further provides that "all equipment and trade fixtures placed in or on the said premises by Floyd shall remain the property of Floyd, which shall have the right to remove the same within ten days after the termination of this lease, provided Floyd be not in default hereunder, and provided further, that Floyd shall repair, or reimburse Beach Company for the cost of repairing any damage resulting to the demised premises from the removal of such trade equipment or trade fixtures."

*Conclusions of Law*

The rights of the Brunswick Corporation in the subject chattels are clearly identifiable and they have been awarded judgment versus the Floyd Corporation by oral order of the

court and by this Order. The rights of the landlord in these chattels on the premises leased to the conditional vendee are not as readily apparent. At common law the landlord has no lien on the personalty of the tenant which arises solely out of the relation.[7] There is in force in South Carolina, however, the Statute of Anne, 8 Anne, c. 14 which is presently codified at Section 41-205 of the South Carolina Code.[8]

> Payment of rent before removal of goods, etc., under execution.—No goods or chattels whatsoever, lying or being in or upon any messuages, lands or tenements which are leased, shall be liable to be taken by virtue of an execution or any pretense whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the premises or his bailiff all such sums of money as shall be due for rent for the premises at the time of the taking of such goods or chattels by virtue of such execution not in excess of one year's rent. In case such arrears shall exceed one year's rent, the party at whose suit such execution is sued out, on paying the landlord or his bailiff one year's rent, may proceed to execute his judgment and the sheriff or other officer shall levy and pay to the plaintiff as well the money so paid for rent as the execution money.

The chattels were delivered upon the premises after recordation of the lease and before the vendor's chattel mortgages

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[7]Frady v. Smith, 247 S.C. 353, 147 S.E. 2d 412 (1966); Burnett v. Boukedes, 240 S.C. 144, 125 S.E. 2d 10 (1962); Fidelity Trust & Mortgage Co. v. Davis, 158 S.C. 400, 155 S.E. 622 (1930); Ex Parte Stackley, 161 S.C. 278, 159 S.E. 622 (1931).

[8]S. C. Code Ann. § 41-205 (1962).

were recorded. Under these facts the landlord would have had the right to distrain on the chattels under section 41-151[9] of the Code without the necessity of paying the amount due on the mortgage debt as a prerequisite as called for in section 41-155 of the Code.[10] However no distraint was made on the subject property[11] and thus no lien was perfected by levy of distress.[12] Once the property comes into the custody of the court as it has here with the seizure by the United States and the appointment of a Receiver by the court it can no longer be distrained.[13] However the protection of section 41-205[14] will still be available to the landlord even without a

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[9]S. C. Code Ann. § 41-151 (1962).

[10]S. C. Code Ann. § 41-155 (1962): Property distrained subject to chattel mortgage, etc.—When property distrained for arrears of rent is subject to the lien of a chattel mortgage placed upon such property and recorded before the rent contract was entered upon or before such property was brought upon the rented premises, the landlord may pay the amount due upon such mortgage debt and subject the property to the payment thereof as well as to the payment of the amount due for rent and the tenant shall inform the officer making distress of any such liens. If the landlord declines or fails to pay such mortgage debt the officer shall return such property on which such chattel mortgage may be a lien to the tenant. And if the landlord have actual notice of any unpaid purchase money lien, such lien shall have priority to his claim for rent in the same manner as above provided for certain chattel mortgages.

[11]The list of property distrained on January 22, 1965 is shown on the warrant. See Defendant's Exhibit C.

[12]Ex Parte Stackley, 161 S.C. 278, 159 S.E. 622 (1931). See note 7 supra.

[13]In re Bishop, 152 F. 304 (D.S.C. 1907): "It would be a contempt of the court for any constable or any other agent of the landlord to interfere with the possession of the court. If such a levy was attempted, the landlord would gain nothing by it." 152 F. at 307. See Malcolmson v. Wappoo Mills, 85 F. 907 (D.S.C. 1898) and 85 F. 912 (D.S.C. 1898); Ex Parte Stackley, 161 S.C. 283, 159 S.E. 622 (1931). 14 S.C. Code Ann. § 41-205 (1962).

[14]S. C. Code Ann. § 41-205 (1962).

distraint and though the property be in *custodia legis.*[15] Under the statute the landlord may look to the chattels for rents that are due at the time of the attempted removal from the premises up to a limit of one year's rents.[16] That being the extent of the statute, the rents falling due after the time of the attempted removal would have to be claimed out of the general estate of the tenant or the receivership.[17].

The position the intervenor takes is that he does not claim priority by virtue of having distrained on the chattels in question,[18] but because the lease agreement provides that chattels may be removed from the premises after the termination of the lease provided the tenant is not in default and further that the tenant is to reimburse the landlord for any damage to the premises as a result of a removal of the chattels: the lease, it is argued, was recorded prior to the chattel mortgages and therefore by dint of the constructive notice of the provisions of the lease they have a prior claim in the chattels. That portion of the lease which is relied upon is as follows:

"10. FLOYD'S PROPERTY.

A. All equipment and trade fixtures placed in or on the said premises by Floyd shall remain the property of Floyd, which shall have the right to remove the same within ten (10) days after the termination of this lease, provided Floyd be not in default hereunder, and provided further, that Floyd shall repair, or reimburse Beach Co. for the cost of repairing any damage resulting to the demised premises from the removal of such trade equipment or trade fixtures."

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[15]Ex Parte Stackley, 161 S.C. 283, 159 S.E. 622 (1931). See cases note 13 supra.

[16]S. C. Code Ann. 41-205 (1962).

[17]Fidelity Trust Co. v. Davis, 158 S.C. 400, 155 S.E. 622 (1930).

[18]See note 11 supra.

That provision creates no rights above the right to distrain on the property, thus no lien is created. The landlord's protection is by virtue of section 41-205.

The matters of priorities having been decided in favor of the landlord as being controlled by section 41-205 the court orders that further argument on the issue of the amount of rents due and protected by the statutes be set at a convenient time and place and entry of judgment be, therefore, reserved pending the hearing and resolution of that issue.

Although it is no longer disputed that the chattels subject to the Brunswick Corporation mortgage are not affixed to the realty but remain personal property there is evidence that the removal of the chattels would result in material damage to the building. Therefore the court orders that further argument be addressed to the issues presented as to the right of the landlord to damages for the removal of the chattels and the amount to be assessed therefor.

For the reasons that have been stated regarding any notice afforded by the prior recordation of the lease the court finds no merit in the intervenor's theory that the Brunswick Corporation is estopped by its conduct from asserting a prior claim in the chattels.

The counterclaim asserted by the intervenor for the alleged conversion by the plaintiff cannot be sustained. Any action for conversion of a property right must be predicated on an unlawful or illegal exercise of dominion and control.[19] The action of the plaintiff here was in accord with the legal pro-

[19] "Conversion is a tortious act and may arise either by a wrongful taking of the chattel or by some other illegal assumption of ownership, by illegally using or misusing it, or by wrongful attention." Castell v. Stephenson Finance Co., 244 S.C. 45, 135 S.E. 2d 311 (1964).

cesses of the state. There is no contention that the process was irregular in any manner: certainly it was not void. There is no evidence that the writ was maliciously issued or without probable cause, thus there is no action maintainable for malicious prosecution.[20] There is no evidence that the writ was improperly used with ulterior motive for a purpose other than which it was intended, thus no action is maintainable for abuse of process.[21] The counterclaim is therefore dismissed.

It is therefore ordered that:

(1) Judgment be entered for the plaintiff against the defendant in accordance with the terms of this Order;

(2) That the intervenor has a prior claim in the subject chattels but that entry of judgment be reserved pending further hearing on the remaining issues of the amount recoverable for unpaid rents and removal damages;

(3) That further argument be set for a convenient time and place;

(4) That the intervenor's counterclaim is hereby dismissed.

AND IT IS SO ORDERED.

s/ Robert W. Hemphill
ROBERT W. HEMPHILL
United States District Judge

Charleston, South Carolina
December 7, 1966

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[20]See Hyde v. Southern Grocery Stores, Inc., 197 S.C. 263, 15 S.E. 2d 353 (1941). See also George v. Leonard, 71 F. Supp. 662 (E.D.S.C. 1947); Wright v. Harris, 160 N.C. 542, 76 S.E. 489 (1912); Pittsburg J. E. & E. R. Co. v. Wakefield Hardware Co., 138 N.C. 175, 50 S.E. 571 (1905).

[21]George v. Leonard, 71 F. Supp. 662 (E.D.S.C. 1947); 1 AM JUR 29 *Abuse of Process* § 4 (1962).

## ORDER OF JUDGE HEMPHILL

### February 27, 1967

The Brunswick Corporation brought this action for claim and delivery of certain bowling equipment which they had sold under a conditional sales contract against their vendee, Floyd Lanes, who was in default on the schedule of payments. Floyd Lanes was also in arrears on building rent payments to the landlord, the Beach Company. When the plaintiff seized the chattels the landlord intervened, claiming an interest in the chattels for the unpaid rents. The tenant (and conditional vendee) who was insolvent, failed to answer. He has been declared in default. The court has in a previous order determined that in the contest for priorities in the chattels between the plaintiff and the intervenor the intervenor had a superior interest in the chattels to the extent that he was protected by the Statute of Anne, 8 Anne c. 14, presently codified at S. C. Code Ann. section 41-205 (1962):

> Payment of rent before removal of goods, etc., under execution.—No goods or chattels whatsoever, lying or being in or upon any messuages, lands or tenements which are leased, shall be liable to be taken by virtue of an execution or any pretense whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the premises or his bailiff all such sums of money as shall be due for rent for the premises at the time of the taking of such goods or chattels by virtue of such execution not in excess of one year's rent. In case such arrears shall exceed one year's rent, the party at whose suit such execution is sued out, on paying the landlord or his bailiff one year's rent, may proceed to execute his judgment

and the sheriff or other officer shall levy and pay to the plaintiff as well the money so paid for rent as the execution money.

At the time of that determination the court ordered that further argument be had on the question of the amount of rents due and protected by the statute and that further argument be also had on the question of the damages, if any, recoverable by the landlord which may be incurred because of the removal of the chattels by the plaintiff after the statute has been complied with. After hearing the arguments the court disposes of the remaining issues as follows.

I.

The rents accrued and due at the time the chattels were seized, February 3, 1965, and which are protected by the statute are $1,486.41. The rental provision of the lease is as follows:

> Floyd agrees to pay Beach Co. for the original ten year term of this lease, a guaranteed minimum rental of $128,557.20 payable in advance in One Hundred and Twenty (120) equal monthly installments of $1,071.31 on or before the 10th day of each month and every month during the ten year term hereof and the additional five year term if exercised by the tenant and at the same rate. Said minimum guaranteed rental shall commence and the first payment shall be due at such time as delivery of the demised premises shall be effected as hereinafter set forth. Provided, however, as heretofore set forth that Floyd shall be and it is hereby given a credit of Three Thousand ($3,000.00) Dollars toward the rental due hereunder and Floyd shall not be obligated for any payment of rental until such time as the sum of Three Thousand ($3,000.00) Dollars shall have been consumed.

The intervenors maintain that the lease requires a lump sum payment for the ten year term in advance and that therefore the adjusted, unpaid portion of the entire ten year rents were due at the time the chattels were seized. In effect they claim they are protected by the statute to the extent of over $100,000 rather than $1,486.41 which was accrued on a monthly basis. In the opinion of the court the lease will not bear that construction. The terms "payable in advance in One Hundred and Twenty (120) equal monthly installments . . . on or before the 10th day of each month" is commonly used in arrangements of this type to mean that each monthly payment is payable in advance for each month. This, in the court's opinion, is the intention of the parties to this lease as evidenced by the language of the lease as a whole and by particular reference throughout the lease to monthly rental payments. There was a supplement[1] to the lease which was entered into about the time the construction of the building was completed. The construction of the building was completed. The supplement provided for an increase in the *monthly rental* from $1,071.31 to $1,085.47. An increase in the ten year total was not even mentioned.

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[1]The language of the supplement is as follows: THAT in consideration of The Beach Co. having complied with the request of the Floyd Corporation in reference to certain extra work to the front of the building and the installation of tile base in the rest room of the building The Beach Co. and the Floyd Corporation have agreed and do hereby agree that the *base monthly rent* in the sum of $1,071.31 set forth in paragraph four of the lease shall be increased by the sum of $14.16 per month for the original term of the lease and any extension thereof, so that the *base rent* by virtue of the improvements made to the building at the request of the Floyd Corporation shall be One Thousand Eighty-five Dollars and 47/100 ($1,085.47)_____ *per month* in lieu of One Thousand and Seventy-One Dollars and Thirty-one Cents ($1,071.31) per month as set out in the said lease. (Emphasis added.)

There are other references throughout the lease which further evidence the intent of the parties that rents were to become due monthly. The lease provides that "the first payment shall be due at such time as delivery of the demised premises shall be effected." Floyd Lanes had supplied some heating and air conditioning equipment for the construction of the building. They agreed that a credit for the equipment of $3,000 would be given which would be applied "toward the rental due hereunder." It is pertinent to show the intention to have the rents accrue monthly that the lease stated in regard of the credit that Floyd Lanes "shall not be obligated for any payment of rental until such time as the sum of $3,000.00 shall have been consumed."

There are at least two more provisions in the lease that are pertinent to this inquiry. At paragraph 3B the lease provides that the credit to Floyd Lanes for heating equipment shall "be made by granting to Floyd a credit on the first rents coming due under the terms of this Lease." At paragraph 23A of the lease it states that: "(i)t is mutually agreed that in the event Floyd shall default in the payment of the rent herein reserved *when due. . .*" (Emphasis added.)

The evidence shows that the intervenors themselves acted consistently with a monthly rental construction of the lease. The law of South Carolina provides that a landlord "may enforce collection of rent due by distress." S. C. Code Ann. § 41-151 (1962). When the intervenor distrained for rent on January 22, 1965 he claimed that the rent due was $2,086.41, the amount accrued and unpaid and considered due by the intervenor at that time.[2] This is reflected on the face of the distress warrant and by the testimony in these proceedings by the rental agent of the intervenors.

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[2]A subsequent partial payment was made thereafter.

Two decisions of the South Carolina Supreme Court have been submitted as authority by the intervenors. In *Mather-James Co. v. Wilson*, 172 S.C. 387, 174 S.E. 265 (1934), a chattel mortgage holder was given priority in the chattels over an unpaid landlord, who had distrained on the chattels, on the grounds that the mortgage had been recorded prior to the rents becoming past due: The court in explanation further stated that the distress lien of a landlord is prior to a mortgage to the extent of the debt for rent due prior to the recordation of the mortgage. The court there adverted to state that "(i)f the rental contract be for a certain amount, say $600.00 for a year, then the entire amount must be considered as due at the beginning of the contract, although the payments may be made on a monthly basis of $50.00 per month." The opinion continued to say that "(w)hile on the other hand, if the rental contract be by the month, the recorded mortgage ranks ahead of the monthly rent which is not due." The principle offered was unsupported by any citation of authority or further analysis.

Since the case involved an oral contract for monthly rent the adversion can only be regarded as obiter dictum on the issue of what rent is due. On no other authority than the dictum the principle was followed in *Leggett & Co. v. Orangebugr Piggy Wiggly Co.*, 176 S.C. 449, 180 S.E. 483 (1934), which involved a lease "for a period of five years at a stated rental to be paid monthly." The latter case would in principle support the intervenors' view of their rights if their view of the lease contract were correct. The court has ruled, however, that under the lease here the rents accrued and became due monthly. The lease under contention in *Leggett & Co.* was not set forth in the report and cannot, therefore, be compared to the lease in the instant case. The rule in *Leggett & Co.*, if blindly applied to this case, would have a severely unjust

result. Although under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), the substantive rules of South Carolina are controlling in this court, the court finds that the instant case is factually distinguishable from *Leggett & Co.* Here, the contract clearly manifests the intention of the parties that the rents become due on monthly basis.

Under section 41-205 of the South Carolina Code the landlord is protected for unpaid rents due at the time of the taking of the chattels but limited to one year's rents. Under the intervenor's view the one year limitation of the statute would be virtually meaningless. That problem, however, is not reached for the evidence permits no other reasonable construction of the lease but that the rents were to fall due monthly, that the rents were to be paid in advance of each month on or before the tenth of each month, and that this arrangement was to continue for a committed term of ten years.

II.

The second point on which the court requested further argument was the matter of compensating the landlord for any damages done to the realty by the removal of the bowling equipment should the plaintiff pursue his remedy, pay the rent due and remove his chattels. The plaintiff, throughout this litigation, has expressed a willingness to compensate the landlord for any damages to which the plaintiff may be liable.

After hearing further argument the court finds no theory on which to base an award of damages. There is evidence that substantial damages would be incurred by the removal of the lanes foundation material. The lanes foundation material consists of 2" by 4" lumber fastened to a concrete underpad with case-hardened steel nails. When these nails are removed, according to the testimony, cone shaped depressions

in the concrete pad will result. There was little testimony given regarding the estimated cost of repairing these holes. The intervenor supplied an estimate during the taking of testimony in response to the question but the figure was at best an estimate made without benefit of all the available aids. There was a wide disparity in the parties esteem of the estimated figure. If a decision and award as to these costs were necessary here the court would be constrained to take further testimony. Alternatively, arrangements could be made to withhold an award until the actual costs could be determined. In the latter alternative the matter would still be subject to dispute over the adequacy of the offered mode of repair. The intervenors' argument on this point has remained the same since a lien in the chattels was claimed throughout this later argument. This position was held with knowledge that the court recognized no lien in the chattels but had ruled the protection was by the Statute of Anne. Had the argument not been so continued the court would be inclined to treat the position as abandoned. After consideration of the parties' respective positions the court fiinds no basis on which to assess these damages against the plaintiff, therefore no further testimony will be necessary. In the previous order of the court dated December 7, 1966, it was found as a fact that the lanes foundation material was not owned by the plaintiff but by the defendant. The plaintiff has not attempted to seize or otherwise claim the lanes foundation material. It would have no right to remove the foundation at this point without further, separate proceedings. It is not subject to their chattel mortgages. If the plaintiff does not remove the foundation, on what basis can they be held accountable for the damages? One's impression of the relation of these parties may have become somewhat distorted because of the intervenors' role as a principal adversary and the absence of the defendant from

the proceedings through default. Out of this unhappy business venture in which the plaintiff sold equipment to the defendant and the intervenor leased a building to the defendant, both the plaintiff and the intervenor suffered loss along with the defendant when the venture failed. The vendor and the landlord cannot be made whole out of each other's pocket. The plaintiff has already taken judgment against the insolvent tenant. Any damages which are brought about by removal of the foundation material are, as between these parties, a matter between the landlord and his tenant, the owner of the foundation material. The risk of rent loss and non-physical damages to the building was, likewise, a matter between the contracting parties to the lease. It has been conceded during these proceedings that the bowling equipment was not so affixed to the realty as to become a part of it, and that it was not intended to be, and that there was no issue raised which would involve the doctrine of trade fixtures. The removal of the bowling equipment was a possibility at some point in time, and this was contemplated by all of these parties. This point is sharply exemplified by the following excerpt from the lease. It recognizes the possibility of removal of the chattels and it recognizes that the landlord was to look to Floyd Lanes for the recovery of damages.

10. FLOYD'S PROPERTY.

A. All equipment and trade fixtures placed in or on the said premises by Floyd shall remain the property of Floyd, which shall have the right to remove the same within ten (10) days after the termination of this lease, provided Floyd be not in default hereunder, and provided further, that Floyd shall repair, or reimburse Beach Co. for the cost of repairing any damage resulting to the demised premises from the removal of such trade equipment or trade fixtures.

The court rules therefore that if the rents due are paid by the plaintiff under the Statute of Anne, the plaintiff may remove the chattels, provided the removal of the chattels is accomplished with as little disturbance to the realty as is possible and as is contemplated by the normal removal procedures.

III.

In order that there may be no misunderstanding regarding the finality of these determinations, the possibility of which has become evident in discourse, the chattels are to be handled hereafter in accord with this order. The chattels will not be subject to distraint after their release.

Let the Clerk enter judgment accordingly.

AND IT IS SO ORDERED.

s/ Robert W. Hemphill
ROBERT W. HEMPHILL
United States District Judge

Florence, South Carolina
February 27, 1967.

## ORDER OF JUDGE WINTER

### February 2, 1968

The primary issue which we are called upon to decide in this case is the extent, under South Carolina law as applied to the particular lease agreement in question, of the priority of a landlord's claim to rent over the claim of a chattel mortgagee to mortgaged property placed upon the leased premises. The district court ruled, against the contention of the landlord that it was entitled to recover the total amount of rent due throughout the term of the lease, that the landlord's claim had priority only to the extent that it was for

rent unpaid during the period which tenant had actually occupied the premises.[1] We affirm.

There is substantial agreement between the parties as to the facts.[2] Brunswick Corporation ("Brunswick") originally sold ten bowling lanes and pinsetters to one Raymond W. Floyd and his partner Swindal, taking a chattel mortgage on the property to secure the unpaid balance of the purchase price. When a default under this mortgage occurred Brunswick repossessed the lanes and pinsetters. Subsequently, Brunswick agreed to sell this equipment to Floyd for the balance due on the original mortgage. Floyd then organized the Floyd Corporation and entered into a ten-year lease, later assigned to The Beach Co. ("Beach"), which provided that the landlord would construct a building suitable for the installation of bowling alleys. The lease further provided that:

> "Floyd agrees to pay Beach Co. for the original ten year term of this lease, a guaranteed minimum rental of $128,557.20 *payable in advance* in One Hundred and Twenty (120) equal monthly installments of $1,071.31 on or before the 10th day of each month and every month during the ten year term hereof and the additional five year term if exercised by the tenant and at the same rate." (emphasis added)

The lease was executed on February 22, 1962, and, in "short form," recorded on March 3, 1962.[3]

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[1] If the landlord's contention were accepted, it would be entitled to $130,256.40; the district court awarded the landlord only $1,486.41.

[2] The parties disagree on whether Floyd Corporation represented to the landlord that the bowling equipment which was to be installed on the premises was free and clear of liens. However, we do not believe that resolution of this dispute is essential to the disposition of the case.

[3] Brunswick has argued on appeal that the short form of the lease, being the only recorded document, did not give subsequent

In March, 1962, Brunswick executed a sales order with Floyd Corporation for certain miscellaneous equipment, and agreed to install the lanes and pinsetters in the building to be constructed by the landlord. After Beach had constructed the building in accordance with the terms of the lease, the bowling equipment was installed, and Floyd Corporation opened for business on September 15, 1962. It was not until October 24, 1962 that a conditional sales contract between Brunswick and Floyd Corporation was executed on the lanes and pinsetters. Although the conditional sales contract on the miscellaneous equipment was executed on August 17, 1962, Brunswick offered no proof before the district court to show that this document was executed before the equipment had been installed. Brunswick's conditional contracts of sale were recorded on August 20, 1962 and January 21, 1963, respectively.[4]

The bowling operation never seems to have been financially successful, and Floyd Corporation was unable to pay any substantial amount under the conditional sales contracts to Brunswick. On the other hand, it was able to make rental payments with some degree of regularity, and Beach took no legal action to enforce payment of the rent until January 22, 1965. On that date Beach distrained certain property of Floyd Corporation situate upon the leased premises—other

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creditors notice of the terms of the full lease. This contention seems inconsistent with the statement of Brunswick's counsel before the district judge that "It is all one lease, except the short lease is just evidence of the long lease. That is what it amounts to." However, we do not need to reach the question whether Brunswick was given notice of the long lease by the recordation of the short lease, but may assume so arguendo.

[4]Under South Carolina law, a "conditional sales contract" is in legal effect a "chattel mortgage." *Speizman* v. *Guill*, 202 S.C. 498, 25 S.E. 2d 731 (1943). In this opinion the terms are used interchangeably.

than that subject to Brunswick's chattel mortgages—for the purpose of collecting rent payments of $2,086.41, then in arrears. This amount was reduced shortly thereafter by Floyd Corporation's partial payment of $600.00.

On February 3, 1965 Brunswick brought the present action against Floyd Corporation seeking a recovery of the mortgaged property—both that subject to the August 17, 1962 conditional sales contract and that subject to the October 24, 1962 conditional sales contract—and a money judgment for the amount due on its various accounts. Upon posting the statutory bond, Brunswick had the United States Marshal seize the mortgaged chattels. Beach intervened, claiming that it had prior right to apply the mortgaged property against not only the amount of rent actually in arrears, but the entire sum due for the balance of the ten-year term. Beach also counterclaimed for actual and punitive damages totalling $50,000.00, alleging that Brunswick had intentionally and wrongfully invaded its priority rights by seizing the chattels.

Floyd Corporation did not appear in the proceedings and the district court gave Brunswick judgment against it for the balances due under the conditional contracts of sale. The district court dismissed Beach's counterclaim; and as to the question of priority, found that although Beach had priority rights under the Statute of Anne, S.C. Code § 41-205, for the rent payments actually in arrears which had accumulated during the preceding year, it had no priority as to the rent for the balance of the ten-year term. From these rulings Beach appealed. In this Court it makes the further contention that Brunswick forfeited its right to possession of the mortgaged property by taking a money judgment against Floyd Corporation.

I

Beach relies strongly upon *Leggett & Co.* v. *Orangeburg Piggly-Wiggly Co.*, 176 S.C. 449, 180 S.E. 483 (1935), in support of its contention that it is entitled to recover the total amount of rent contracted for in the lease. Unlike the landlord in *Piggly-Wiggly*, Beach did not distrain upon the property which it seeks to make subject to its claim. However, under South Carolina law a court will preserve the priority of the landlord's claim when the property is in custodia legis, *Ex Parte Stackley*, 161 S.C. 278, 159 S.E. 622 (1931); and although the priority protected in the *Stackley* case was only to the extent of one year's rent in accordance with the Statute of Anne, we believe that a court should exercise its power to protect the landlord's priority to whatever extent it may have been asserted under the process of distraint. Otherwise, a chattel mortgagee, who concededly had lost his priority over the landlord by his failure to record his mortgage, could regain this priority by the simple expedient of bringing a claim and delivery action before the landlord has distrained.

Thus, appellant's rights are to be measured by its right of distraint, as defined by South Carolina law, and we turn to a consideration of *Leggett & Co.* v. *Orangeburg Piggly-Wiggly Co.*, *supra*. In that case, after a lease—which provided that all the rent for the entire five-year term was due from the date of the lease—had been entered into and recorded, the premises were renovated and mortgaged property was placed thereon. The relevant mortgages were not recorded until approximately one month later. Almost two years thereafter, receivership ensued, at a time when there remained a substantial amount unpaid on the mortgage debt as well as on the rent, which the tenant had not paid during the latter part of the preceding year. On these facts the Supreme Court of South

Carolina held that by virtue of the clause of the lease providing that all the rent was due at the beginning of the term, the landlord was a creditor of the tenant for that amount by the time the mortgages were recorded and the landlord had the right to distrain for such sum.

One aspect of *Piggly-Wiggly* which is different from the case at bar appears on its face to make that case all the stronger authority for Beach, the landlord herein: In *Piggly-Wiggly* the chattel mortgages were at least executed, though not recorded, before the chattels were placed upon the leased premises. In some situations this distinction might well be of significance, as is indicated by the recent case of *Frady* v. *Smith*, 247 S.C. 353, 147 S.E. 2d 412 (1966), in which it was held that the landlord's actual notice of a chattel mortgage which had been executed after the mortgaged property was placed upon the leased premises could not deprive the landlord of his right to distrain for unpaid rent which at least partially accrued after he had acquired notice of the mortgage.[5] However, Brunswick, unlike the mortgagee in *Frady*,

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[5]Compare *Mather-James Co.* v. *Wilson*, 172 S.C. 387, 174 S.E. 265 (1934), in which the court said that where a chattel mortgage, although executed before the mortgaged chattels are placed upon the leased premises, is not recorded until after, the chattel mortgagee's claim is prior to the landlord's to the extent that a default in the rent payments did not occur until after recording of the mortgage. Similarly, in *Haverty Furniture Co.* v. *Worthy*, 241 S.C. 369, 128 S.E. 2d 707 (1962), it was held that a landlord's actual knowledge of a chattel mortgage which was not recorded until after the landlord had distrained the mortgaged chattel, but which was executed before the chattel was placed upon the leased premises, prevented the landlord from having priority over the chattel mortgagee in his claim for rent.

Thus, it seems that although a chattel mortgagee who obtains a mortgage before the chattels are placed upon the leased premises, but does not record it until after, does not come within the protection of § 41-155 of the South Carolina Code, he does have any additional priority rights over the landlord which the general

is not arguing that it possesses statutory priority which abrogates the landlord's right to distrain; rather, conceding Beach's priority, Brunswick contends that the landlord's right to distrain is limited to the rent which had already been earned by the tenant's actual occupation of the premises.[6] Thus, we regard the fact that Brunswick's mortgages were not executed until after the chattels were installed in the building constructed by Beach as not defeating Brunswick's rights after Beach's right to accrued and unpaid rent was satisfied.

In allowing Beach to recover only for the amount of rent which had actually been earned, the district court distinguished *Piggly-Wiggly* on the ground that the lease involved here did not in fact provide that the total amount of the rent should be due at the beginning of the term. He reasoned that the term providing that the rent shall be "payable in advance in One Hundred and Twenty (120) equal monthly installments • • • on or before the 10th day of each month" meant only that each monthly payment is payable in advance for each month. He cited several other clauses in the lease, such as that providing that Floyd Corporation "shall not be obligated for any payment of rental until such time as the sum of $3,00.00 [a credit given by the landlord for certain equipment supplied by Floyd Corporation] shall have been consumed" and another providing that the same credit shall "be

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lien statutes grant to him. On the other hand, under the *Frady* case, it appears that where the chattel mortgage is not only not recorded, but also not executed until after the mortgaged property has been placed upon the leased premises, the landlord's right to distrain has priority over the claim of the chattel mortgagee regardless of whether the landlord has notice, constructive or actual, of the mortgage at the time the rent goes into arrears.

[6] In other words, as we understand Brunswick's position, it admits that the landlord would have a right to distrain for all rent which was due, whether it accrued before or after Brunswick's recording of its mortgages.

made by granting to Floyd a credit on the first rents coming due under the terms of this lease," to show that the parties had intended that the rent was to become due monthly. Moreover, he pointed out that Beach itself had acted consistently with this interpretation of the lease when on January 22, 1965 it distrained certain property of Floyd Corporation and claimed only those *monthly* rentals which were then in default.

We find the reasoning of the district judge convincing and his conclusion sound. We agree that *Piggly-Wiggly* does not control. Indeed, our examination of the case law of South Carolina suggests strongly that either *Piggly-Wiggly* has been overruled *sub silentio*, or that the Supreme Court of South Carolina would not apply its holding to the case at bar.

Five years after *Piggly-Wiggly* was decided, the State Supreme Court was presented with the question which it phrased as whether "an acceleration clause [in a lease] • • • authorize[s] a landlord to distrain for rent which • • • [has] not been earned or accrued." *Gentry* v. *Recreation, Inc.*, 192 S.C. 429, 7 S.E. 2d 63 (1940). Without mentioning *Piggly-Wiggly*, the court answered this question in the negative. It recited as factors influencing its decision: (1) the hesitancy of courts in many jurisdictions to hold such acceleration clauses valid for any purpose whatsoever since they are in the nature of a penalty; (2) the fact that such acceleration clauses were alien to the common law, from which the remedy of distraint emerged; (3) language from *Fidelity Trust & Mortgage Co.* v. *Davis*, 158 S.C. 400, 155 S.E. 622 (1930), which, significantly, before being revived in *Gentry* had been overruled by a line of cases culminating in *Piggly-Wiggly*, that distraint is appropriate only "when the rent is in arrears;" and (4) then § 8822 of the South Carolina Code, which provided that if a tenant vacated the premises before his term had expired, the rent for the balance of the month in which the tenant left

became immediately due and the landlord could distrain therefore.[7]

Without equivocation, the South Carolina Supreme Court concluded in *Gentry* that "we are definitely of the opinion that the lessors were not entitled to the remedy of distress for such unearned future rent." 7 S.E. 2d at 66. In light of this flat statement and the fact that the reasons given by the court for its decision are equally applicable to the lease provision purporting to make the total rent due at the beginning of the term as to one purporting to accelerate future rent in the event of default, we feel that if the South Carolina Supreme Court were now presented with the instant case, it would not distinguish *Gentry* on the ground that *Gentry* concerned an acceleration clause and would hold that the landlord is entitled only to recover that rent which had been earned by the tenant's actual occupation of the premises.[8] We are aware that § 8822 of the 1932 South Carolina Code, upon which the court partially relied in *Gentry*, was repealed in 1946. However, the significance of the repeal is elusive. The repeal could mean either that parties are now free to include acceleration clauses, or their equivalent, in leases in order to broaden the landlord's right of distraint, or that a landlord has now been stripped of even the limited accelera-

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[7]The statutory section cited by the court was not necessarily support for the view that the legislature intended to restrict he landlord's righ of distraint to recovery for only one month's rent in the event that the tenant vacated the premises. The court could have reasoned with equal logic that § 8822 did not prohibit the parties to a lease from providing for acceleration of rent for a greater term than one month, but only prescribed that in the absence of such agreement, acceleration of one month's rent would be effected as a matter of law.

[8]Appellee has also drawn our attention to the fact that the South Carolina Supreme Court has never once cited the *Piggly-Wiggly* case in the more than thirty years since it was decided.

tion right which had previously been given him by statute and can distrain only for that amount which was actually due at the time the tenant vacated the premises. Because of the demonstrated tendency of the Supreme Court of South Carolina to interpret relevant legislative action as limiting the landlord's distraint rights, see footnote 7, *supra*, it is probable that that Court would adopt the latter interpretation of the repeal.[9]

## II

Affirmance of the district court's dismissal of Beach's counterclaim necessarily follows from our resolution of the principal issue in the case. For it is clear that Beach is not entitled to recover damages resulting from an intentional trespass upon priority rights, if in fact it possessed no such rights. The cases cited by appellant are distinguishable on this ground. See, *e.g.*, *Webber* v. *Farmers Chevrolet Co.*, 186 S.C. 111,

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[9]We also recognize that in *Gentry* since the lease in question was not recorded, the Court's statements concerning the inability of the acceleration clause to broaden the landlord's right of distraint was at most an alternative ground for the decision. Thus the Court said: "We are therefore of opinion from the record in this case that the respondent stands in the impregnable position of a wholly innocent third party, and hence would not be bound by the acceleration clause in the lease, even if it could be construed as conferring the right of distress." 7 S.E. 2d at 67.
That the portion of the *Gentry* decision upon which we rely is only an alternative holding ,or even only dictum, does not persuade us that we should ignore it, however. Our function in applying state law under *Erie R.R. Co.* v. *Tomkins*, 304 U.S. 64 (1938), is to attempt to decide the case before us in the same manner as would the state courts. Clearly, we would not be exercising this function if our approach was to restrict all of the state precedents to their own facts and to make nice distinctions between holdings and dicta, while failing to take into account all relevant indications of the state of the law of the state. Indeed, the fact that a state court has reached a question which it was not necessary for it to reach may be the surest guide as to how it would decide future cases raising similar issues.

195 S.E. 139 (1938); *Bingham* v. *Harvy*, 91 S.C. 121, 74 S.E. 869 (1912).

Beach is, of course, entitled to recover all of the unpaid rent which had accrued up to the time of the seizure of the chattels under the Statute of Anne, S. C. Code § 41-205, since the period for which the rent was due did not exceed one year. But Brunswick has not interfered with this priority in any manner and has not even contested Beach's right to recover this amount.

## III

We also find no merit in Beach's contention that Brunswick forfeited its right to possession of the chattels on which it held mortgages by taking a money judgment against Floyd Corporation. It is true that the South Carolina claim and delivery action affords a restricted remedy to a successful plaintiff, i. e., he is entitled only to a judgment for possession of the chattel which he sought to recover, or, if return of the property is impossible, to a money judgment for its value. S. C. Code § 10-2516; *Wilkins* v. *Willimon*, 128 S.C. 509, 122 S.E. 503 (1924). But the action brought by Brunswick was not merely for claim and delivery. In its complaint Brunswick requested possession of the chattels *and* a money judgment against Floyd Corporation, both remedies being available to it as a mortgagee. *Speizman* v. *Guill*, 202 S.C. 498, 25 S.E. 2d 731 (1943). It would be unreasonable to hold that by obtaining a money judgment against his debtor, a creditor cannot reach the principal asset available to enforce that judgment, especially when a lien on this asset was bargained for as security for the extension of credit.

Beach seeks to distinguish the *Speizman* case on the ground that the plaintiff there foreclosed the mortgage without following the claim and delivery procedure and, therefore, was

not able to gain possession of the mortgaged chattel before obtaining his judgment. We find this distinction unconvincing. In *Stokes* v. *Liverpool & London & Globe Ins. Co.*, 130 S.C. 521, 126 S.E. 649 (1925), relied on by the Court in *Speizman*, it was pointed out that claim and delivery is one of several methods by which foreclosure can be accomplished, and no suggestion was made in that case that by choosing to follow this procedure a mortgagee is precluded from obtaining both a judgment on his mortgage debt and possession of the mortgaged chattel to satisfy that debt. Nor do we perceive any reason to achieve such a result. Protection against the abuse to which the immediate possession provision of the claim and delivery action is subject is provided by the requirement that the party invoking the procedure post bond or subject himself to the risk of punitive damages. S. C. Code § 10-2516. There is no necessity for the additional safeguard of forcing a mortgagee, who desires to avail himself of the claim and delivery action in order to foreclose a mortgage, to sacrifice remedies otherwise available to him. Accordingly, the district court committed no error in granting Brunswick the right to remove the chattels in accordance with its conditional sales contracts. *Affirmed.*

**ORDER OF JUDGE HAYNSWORTH, JR.**

**March 27, 1968**

The panel of the Court which heard and decided the above entitled case having read and considered a petition by J. C. Long, Alberta S. Long and The Beach Co. for an extension of time to file a petition for rehearing, and having concluded that said petition should not be granted, it is ORDERED, that said petition be, and it is hereby, denied.

s/ Clement F. Haynesworth, Jr.
Chief Judge

March 27, 1968

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APPENDIX B

No._____

IN THE

# Supreme Court of the United States

October Term 1968

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J. C. LONG and ALBERTA S. LONG, PETITIONERS

versus

BRUNSWICK CORPORATION, a corporation

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Section 10-2501, Code of Laws of South Carolina, 1962:

> "§ 10-2501. WHEN PLAINTIFF MAY CLAIM IMMEDIATE DELIVERY.—The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any thime before answer, claim the immediate delivery of such property, as provided in this chapter."

Section 10-2504, Code of Laws of South Carolina, 1962:

> "§ 10-2504. REQUISITION TO SHERIFF TO TAKE AND DELIVER PROPERTY.—The plaintiff may thereupon, by endorsement in writing upon the affidavit require the sheriff of the county in which the property claimed may be to take the property from the defendant and deliver it to the plaintiff."

Section 10-2516, Code of Laws of South Carolina, 1962:

"§ 10-2516. WHAT JUDGMENT FOR.—In an action to recover the possession of personal property judgment for the plaintiff may be for the possession, for the recovery of possession or for the value thereof in case a delivery cannot be had and for damages, both punitive and actual, for the detention. If the property has been delivered to the plaintiff and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof, in case a return cannot be had, and damages, both actual and punitive, for taking and withholding the property.

But when either party gives bond for the property, as provided by law, no punitive damages shall be allowed for anything occurring after the giving of the bond."

Section 41-4, Code of Laws of South Carolina, 1962:

"41-4. RECORDATION OF LEASES REQUIRED FOR NOTICE—in order to give notice to third persons any lease or agreement for the use or occupancy of real estate shall be recorded in the same manner as a deed of real estate."

Section 41-165, Code of Laws of South Carolina, 1962:

"§ 41-165. REMEDY OF DISTRESS CUMULATIVE. —The remedy of distress shall be deemed cumulative with respect to any other remedy for the collection of rent."

Section 41-205, Code of Laws of South Carolina, 1962:

"41-205. PAYMENT OF RENT BEFORE REMOVAL OF GOODS, ETC., UNDER EXECUTION.—No goods or chattels whatsoever, lying or being in or upon any

messuages, lands or tenements which are leased, shall be liable to be taken by virtue of an execution or any pretense whatsoever, unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the said premises by virtue of such execution or extent, pay to the landlord of the premises or his bailiff all such sums of money as shall be due for rent for the premises at the time of the taking of such goods or chattels by virtue of such execution not in excess of one year's rent. In case such arrears shall exceed one year's rent, the party at whose suit such execution is sued out, on paying the landlord or his bailiff one year's rent, may proceed to execute his judgment and the sheriff or other officer shall levy and pay to the plaintiff as well the money so paid for rent as the execution money."

Section 57-308, Code of Laws of South Carolina, 1962:

"57-308. PAROL AND UNRECORDED RESERVATIONS IN PERSONAL PROPERTY BY VENDORS AND BAILORS.—Every agreement between the vendor and vendee or the bailor and bailee of personal property whereby the vendor or bailor shall reserve to himself any interest on the property shall be null and void as to subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for a valuable consideration without notice unless such agreement be reduced to writing and recorded in the manner provided by law for the recording of mortgages. But nothing herein contained shall apply to livery stable keepers, inkeepers or other persons letting or hiring property for temporary use or for agricultural purpose or depositing such property for the purpose of repairs or work or labor done thereon or as a pledge or collateral to a loan."

Section 60-101, Code of Laws of South Carolina, 1962:

"60-101. CONVEYANCES, ETC., VALID AS TO PURCHASERS, ETC. ONLY WHEN RECORDED.—All deeds of conveyance of lands, tenements or hereditaments, either in fee simple or for life, all deeds of trust or instruments in writing conveying either real or personal estate, creating a trust in regard to such property or charging or encumbering it, all mortgages or instruments in writing in the nature of a mortgage of any property, real or personal, all marriage settlements or instruments in the nature of a settlement of a marriage, all leases or contracts in writing made between landlord and tenant for a longer period than twelve months, all statutory liens on buildings and lands for materials or labor furnished on them, all statutory liens on ships and vessels, all certificates of renunciation of dower, all contracts for the purchase and sale of real property, all assignments, satisfactions, releases and contracts in the nature of subordinations, waivers and extensions of landlords' liens, labors' liens, sharecroppers' liens or other liens on real or personal property, or both, created by law or by agreement of the parties and generally all instruments in writing required by law to be recorded in the office of the register of mesne conveyances or clerk of court in these counties where the office of the register of mesne conveyances has been abolished or in the office of the Secretary of State delivered or executed on or after August 1, 1934, except assignments and satisfactions of conditional sale contracts securing the purchase money of motor vehicles or refrigerators or security interest in vehicles of types for which certificates of title are required under Chapter 3 of title 46, shall be valid so as to affect the rights of subsequent creditors (whether lien creditors or simple

contract creditors) or purchasers for valuable consideration without notice only from the day and hour when they are recorded in the office of the register of mesne conveyances or clerk of court of the county in which the property affected is situated, in the case of real estate, or in the case of personal property, in which the owner of such property resides, if he resides within the State, or, if he resides without the State the county in which such personal property is situated at the time of the delivery or execution of such deed or instrument. But in case of a subsequent purchaser of real estate, or in the case of a subsequent lien creditor on real estate or personal property or both, for valuable consideration without notice, the instrument evidencing such subsequent conveyance or subsequent lien must be filed for record in order for its holder to claim under this section as a subsequent creditor or purchaser for value without notice, and the priority shall be determined by the time of filing for record. But chattel mortgage or insturments in the nature thereof, securing the payment of the purchase price or any portion thereof of household furniture and furnishings, appliances, refrigerators, radios, and musical instruments shall be valid against the lien of a landlord for rent when so recorded within five days from date of the execution thereof.".

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No. 1385

# In the Supreme Court of the United States

OCTOBER TERM 1968

J. C. LONG and ALBERTA S. LONG,
*Petitioners,*

vs.

BRUNSWICK CORPORATION, a corporation,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

The petition for certiorari in this case does not purport to raise any federal question. The sole contention is that the decision below is inconsistent with South Carolina decisions and statutes and therefore "violates the principles of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64". The Court of Appeals and the District Court, conceding that South Carolina law was controlling, carefully analyzed the South Carolina authorities (pp. 17a-18a, 25a-30a).* District

* The page references are to the Appendix to the petition for certiorari.

Judge Hemphill and Chief Judge Haynesworth of the Court of Appeals have, of course, had long experience with South Carolina law. There is no good reason for this Court to review their ruling as to the law of that state. *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708 (1949). Ordinarily this Court accepts and does "not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts". *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944).

The facts of the case and the arguments supporting the decision below are adequately set forth in the opinion of the Court of Appeals (pp. 21a-32a). Petitioners' principal contention is that the lease established an obligation in advance for the entire ten-year term, and not merely a monthly rental. The clause describing the rental obligation seems to be unclear as to this, but both courts below, analyzing the lease as a whole, found that other provisions showed that the latter meaning was intended (pp. 15a-16a, 27a-28a). These additional provisions do not appear to have been contained in the lease involved in the South Carolina case which petitioners assert to be in conflict with the decision below, but which the court below found distinguishable. *Leggett & Co.* v. *Orangeburg Piggly-Wiggly Co.*, 176 S.C. 449, 180 S.E. 483 (1935). The Court of Appeals also found that the *Piggly-Wiggly* case was out of line with subsequent Supreme Court of South Carolina decisions (pp. 28a-30a).

This Court does not sit to determine the correct interpretation of particular leases under state law.

Petitioners' second contention, that by taking a money judgment respondent forfeited its right to repossession, turns on a construction of South Carolina statutes. The

Court of Appeals reasonably found that the South Carolina "claim and delivery" statute was not the exclusive remedy and that it would not preclude a person from both seeking possession and a money judgment. Relying upon South Carolina authority, the Court of Appeals concluded that (p. 31a):

> "It would be unreasonable to hold that by obtaining a money judgment against his debtor, a creditor cannot reach the principal asset available to enforce that judgment, especially when a lien on this asset was bargained for as security for the extension of credit."

If petitioners were correct, they would not only have repossessed after three years a building costing over $90,000 (Tr. 177), but would also have recovered rentals amounting to $100,427 for the remaining seven years of the canceled lease, while respondent recovered nothing for its lanes, pin setters and bowling equipment. Petitioners' claim, therefore, has no more basis in equity than it does in law.

This case clearly presents no question worthy of review by this Court. The petition for certiorari should, therefore, be denied.

Respectfully submitted,

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